NO. 49245-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO RAMIREZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge
The Honorable Stephen Brown, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain appellant's conviction for first degree robbery.

2. The State presented insufficient evidence to sustain appellant's conviction for attempted first degree robbery.

3. Appellant was denied his constitutional right to jury unanimity on first degree robbery and attempted first degree robbery.

4. The trial court erred in joining appellant's case with his co-defendants for trial.

5. The trial court erred in denying appellant's motion to sever appellant's case from his co-defendants for trial.

6. The trial court violated appellant's Sixth Amendment right to confrontation by admitting incriminating testimonial evidence without the opportunity to cross-examine the witness who conducted the testing.

7. The trial court violated the prohibition against double jeopardy when it failed merge his fourth degree assault and first degree robbery conviction.

8. The trial court violated the prohibition against double jeopardy when it failed to merge his fourth degree assault and attempted first degree robbery conviction.

9. Cumulative error denied appellant a fair trial.

10. Pursuant to RAP 10.1(g)(2), appellant adopts by reference the assignments of error set forth in each of the co-appellant's opening briefs.[1]

Issues Pertaining to Assignments of Error

1. The jury was instructed that they could convict appellant of first degree robbery if they found that he committed the act either by displaying what appeared to be firearm or other deadly weapon, or by inflicting bodily injury. Is reversal required where appellant's right to jury unanimity was violated because there was insufficient evidence that to prove that the robbery was committed by the alternative means of displaying what appeared to be a firearm or other deadly weapon?

2. Appellant was also charged with attempted first degree robbery based on the same act that lead to the first degree robbery charge. Where there was insufficient evidence to prove appellant committed the first robbery by the alternative means of displaying what appeared to be firearm or other deadly weapon, is the evidence likewise insufficient to prove that

[1] RAP 10.1(g) provides that: "In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another." On August 19, 2016, this Court consolidated this appeal with State v. Steven Nicholas Russell, No. 49265-2-II and State v. Daniel Galeana Ramirez, No. 49245-8-II.

appellant took a substantial step toward committing first degree robbery based on that same alternative means?

3. Did the trial court violate appellant's due process right to a fair trial by joining appellant's case with that of the two co-defendants where there was a gross disparity in the weight of evidence against each defendant and use of a single trial invited the jury to cumulate evidence to find appellant guilty or infer a criminal disposition?

4. Did the trial court violate appellant's due process right to a fair trial in failing to sever appellant's case with that of the two co-defendants where there was a gross disparity in the weight of evidence against each defendant and use of a single trial invited the jury to cumulate evidence to find appellant guilty or infer a criminal disposition?

5. The Confrontation Clause demands that an accused person be afforded the opportunity to cross-examine a witness who creates incriminating testimonial evidence. Here, the State failed to call as a witness the person who conducted cellphone testing in preparation of trial. Instead, the State called a surrogate witness who had never seen the cellphone, did not participate in the testing, and conducted no independent testing of her own. Is reversal required where the surrogate witness could only relate the conclusions reached by the expert who actually conducted the testing, and

the State cannot demonstrate that violation of appellant's confrontation rights was harmless beyond a reasonable doubt?

6. A defendant has the constitutional right to be free from being placed twice in jeopardy as a result of multiple sentences for multiple convictions. Appellant was convicted of two counts of fourth degree assault and one count each of first degree robbery and attempted first degree robbery arising from a single incident. Where the assaults provided the force necessary to elevate the robbery and attempted robbery charges to the first degree, and had no independent purpose or effect, did the trial court violate appellant's right against double jeopardy by failing to merge the offenses for sentencing purposes?

7. Did cumulative error deprive appellant of a fair trial?

8. Pursuant to RAP 10.1(g)(2), appellant adopts by reference the issue statements set forth in each of the co-appellant's opening briefs.

B. STATEMENT OF THE CASE

1. Procedural History.

The Grays Harbor county prosecutor charged appellant Alejandro Ramirez by amended information with one count of first degree robbery against Agustin Morales-Gamez, and one count of attempted first degree robbery against Jose Leiva-Aldana, for an incident alleged to have occurred on October 24, 2015. The State also charged Ramirez with two

counts of fourth degree assault for the same incident on October 24, 2015. The State further alleged that the robbery and attempted robbery incidents were committed with a firearm. CP 42-44; 1RP[2] 29-30.

Before trial, the State moved to join Ramirez's case with Daniel Galeana Ramirez[3] and Steven Russell. Supp. CP ___ (sub no. 13, Motion & Declaration for Joinder of Defendants, filed 12/8/15); 1RP 1-6. Galeana was charged with two counts of first degree assault while armed with a firearm. Russell was charged with one count each of first degree robbery while armed with a firearm, and one count of attempted first degree robbery while armed with a firearm, two counts of first degree assault while armed with a firearm, and two counts of fourth degree assault. CP 72 (instruction 2).

The trial court ordered the cases joined for trial over defense counsel's objection. CP 16; Supp. CP ___ (sub no. 27, Notice of Defense Objection to Joinder of Defendants and Continuance of Trial Date, filed 12/8/15); Supp. CP ___ (sub no. 28, Defense Brief Objecting to Joinder

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[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – January 4, 2016 & June 17, 2016; 2RP -- February 16, 2016; 3RP -- April 8, 2016; 4RP -- April 22, 2016; 5RP -- June 22, 2016; 6RP -- June 28, 2016; 7RP -- June 28, 2017 (Voire Dire & Jury Selection); 8RP -- June 29, 2016 (Opening Statements); 9RP -- June 29, 2016 (Trial); 10RP -- June 20, July 1, July 6, 7, 8, and 22, 2016; 11RP -- July 29, 2016.

[3] To avoid confusion, this brief will refer to Daniel Galeana Ramirez by his middle name. No disrespect is intended.

and Continuance of Trial, filed 12/8/15); 1RP 9-15, 22-23. Ramirez's subsequent motions to sever his charges from Russell and Galeana were denied. CP 17-19, 57; 1RP 35-36; 2RP 2; 4RP 68, 84-104.

The jury trial spanned one week and involved several days of testimony from 22 total witnesses. See 9RP-10RP. A jury found Galeana and Russell guilty as charged. 10RP 732-36, 742-47. The jury declined to find that Russell had committed the robbery or attempted robbery with a firearm. 10RP 742-43. A jury also found Ramirez guilty as charged. CP 93, 95, 97-98; 10RP 737-41. The jury also declined to return special verdicts finding that Ramirez was armed with a firearm during the first degree robbery and attempted first degree robbery. CP 94, 96; 10RP 737-38.

Based on an offender score of 10, Ramirez was sentenced to concurrent prison sentences of 171 months on the first degree robbery conviction and 120 months on the attempted first degree robbery conviction. CP 111-22; 11RP 15-16. Ramirez was also sentenced to a concurrent 364 day sentences for each of the fourth degree assault convictions. The assault sentences ran consecutive to the robbery and attempted robbery sentence. CP 111-22; 11RP 14-15.

The trial court imposed only mandatory legal financial obligations, agreeing that Ramirez was indigent. CP 116-17; 11RP 14-15. Ramirez timely appeals. CP 125.

2. Trial Testimony.

Late in the evening of October 24, 2015, Agustin Morales-Gamez and Jose Leiva-Aldana walked back to their shared apartment in Aberdeen after having several beers at a bar. 9RP 89-92; 10RP 91-93. Before going to the bar, they had also shared a six-pack of beer in their apartment. 9RP 90-92; 10RP 93, 105-06, 121, 126. As Morales-Games and Leiva-Aldana walked through an alleyway, they were approached by four men. 9RP 92-94, 97-98; 10RP 94, 106, 110.

Two of the men asked for money and tried to get in Leiva-Aldana and Morales-Gamez's pockets. 9RP 92-94; 10RP 95. Morales-Gamez was hit in the head and fell to the ground. 9RP 92-94; 10RP 95-96, 149-50. The men used their feet and fists to accost Leiva-Aldana. 10RP 94-95, 129. During the scuffle, Morales-Gamez used a small folding knife to defend himself. Because it was dark he could not tell if he struck anyone with the knife. 9RP 96-97, 120, 124, 148-49, 166; 10RP 145. After about five minutes the men ran away. 10RP 96. A cellphone was taken from Morales-Gamez. 9RP 95. Nothing was taken from Leiva-Aldana. 10RP 95.

Nicole Smith and Aaron Johnson lived near the alley and went outside when they heard screaming and yelling. 9RP 18, 45-47, 58. Smith and Johnson saw two men punching and kicking Morales-Gamez and Leiva-Aldana. 9RP 18-19, 29, 40, 45-48, 63-64, 75, 79. Smith and Johnson did not see a gun, knife, or other weapon, in either man's hands. 9RP 36, 38, 65-66, 75-76, 78, 83.

Smith described one of the men as wearing a black hoodie and tan pants. The other man was also wearing a large black hoodie that covered his face. She could not identify the color of his pants. 9RP 19-20, 25, 35-36. Johnson said the heavier set man was wearing tan pants, a white t-shirt, and brown boots. The other man was wearing a large black hoodie and black pants. 9RP 48-49, 59-60, 74. Johnson could not see the face of the man wearing the hoodie and could not identify him. 9RP 74, 85. Smith and Johnson later identified Russell as one of the two men. 9RP 25-26, 51-53; 10RP 277, 280, 283, 298. No evidence shows that Smith or Johnson ever identified Ramirez as the other man.

Smith called police after the incident ended. 9RP 21-22, 50, 54. Johnson told police one of the men was Caucasian. 9RP 66-71. Similarly, Smith told police one of the men was a "white guy". 9RP 31, 43. They also turned over to police a cellphone they found lying near the scene of the incident. 9RP 23, 54, 71-73; 10RP 14-15, 17, 222-23, 249.

Police interviewed Morales-Gamez and Leiva-Aldana at the police station shortly after the alley incident. Morales-Gamez had bruising and swelling on the top of his head. Leiva-Aldana had abrasions to his right knuckles. 10RP 217-20.

Morales-Gamez could not identify the men because of the darkness. 9RP 97. Morales-Gamez was only able to describe one of the men as "tall and thin" and the other as "shorter and younger." 9RP 98-99. The tall man was wearing a white jacket and black pants whereas the shorter man was wearing a white shirt and white pants. 9RP 99-100. Morales-Gamez also denied that anyone had a gun, knife, or any other weapon during the alleged incident. 9RP 95, 100, 127-28.

Leiva-Aldana testified that the taller man had light hair and a mustache. He was wearing blue pants and a black jacket. 10RP 97-98, 143. He told police however that the tall man was "very blond" and "appeared to be American." 10RP 108, 536-44. Leiva-Aldana could only say that he "saw something dark" in the hands of one of the men. 10RP 95, 150.

During the interview, officer Monte Glaser noticed that Morales-Gamez had a knife sheath on his belt. He did not confiscate it however, because he did not believe it was relevant to the robbery investigation. 10RP 233-24. Glaser offered Morales-Gamez and Leiva-Aldana a ride home after

the interview ended but they refused, choosing to walk home instead. 10RP 221-22, 236.

Meanwhile, Ramirez was taken to Grays Harbor Community Hospital by Russell and Galeana. Ramirez had a stab wound to his abdomen. 10RP 158-63, 167-68, 170-75, 184, 258-59. Ramirez was wearing a large sweatshirt that had some blood and a hole in it. 10RP 196-98. Ramirez remained in the emergency room until around 6:00 a.m. on October 25, 2015. 10RP 175-77, 261-62, 266. When Ramirez left the emergency room he was picked up by Galeana. 10RP 263.

Around 2:00 a.m. on October 25, 2015, several witnesses were awoken by the sound of gunshots. 9RP 40-41, 55, 80-81; 10RP 170-78, 186-90, 199-202. When police responded they found Leiva-Aldana with a single gunshot wound to his abdomen. 10RP 101-03, 228-29, 237-39. Morales-Gamez had an injury to his foot. 10RP 254. Both men had an "obvious" odor of alcohol on their breath. 10RP 240-41, 244-45.

Morales-Gamez and Leiva-Aldana identified the shooters as the same four men who attacked them in the alley. 9RP 106, 128, 169; 10RP 100-01, 132-34. Leiva-Aldana identified Galeana as the one who pulled the trigger. 10RP 104, 148, 320-26. When presented with a photo montage, Morales-Gamez identified someone other than Galeana as the person who did the shooting. 10RP 351-53, 402-04. Morales-Galeana

later identified Russell from a photo montage as one of the people who committed the alleged robbery. 10RP 352-55.

Police confiscated a knife from Leiva-Aldana while he was being treated for the gunshot wound. 10RP 179-83, 230-31. DNA testing on the knife revealed human blood. 10RP 458-59, 461. Ramirez was "excluded as the source of that DNA". 10RP 459-61. Leiva-Aldana denied washing the knife before giving it to police. 10RP 127.

Police found a fired bullet inside a van near the scene of the shooting. 10RP 306-08, 311-12, 317, 393. About two weeks after the shooting incident, police also recovered a .38 caliber gun from someone who was not involved in the shooting. 10RP 415, 436, 448-49. Forensic testing showed the recovered bullet was fired from the .38 caliber gun. 10RP 475-80, 490.

Police also collected surveillance video from the Aberdeen Fire Department located near the scene of the alleged robbery. 10RP 332-34, 340; Exs. 62-63. No evidence shows the surveillance video was ever shown to Morales-Gamez or Leiva-Aldana, and they were not asked to identify anyone in the video or describe what it showed. 10RP 665-66.

The cellphone turned over to police by Smith and Johnson was sent by the Aberdeen Police Department to Utah for forensic "chip-off" testing. 10RP 18-19, 33, 42, 51-53, 89-90; See also, infra section C.3(a)-(e). Based

on forensic testing, police officer David Cox, determined the cellphone belonged to Russell because his name was attached to text messages and an email address. 10RP 358, 378, 495. The phone received a text message at 7:00 p.m. on October 24, 2015, from a contact named "Silent". 10RP 387-88; Exs. 42, 52-53, 58, 64-65, 77. Cox opined that "Silent" was Ramirez because of a tattoo on his arm that says "Silent". 10RP 382-86.

Russell's sister and girlfriend testified on his behalf. Both women explained that they were woken around 2:00 a.m. on October 25, 2015 to knocking on the front door of the apartment. Russell who did not have a key to the apartment, was at the front door. 10RP 512, 525-26, 530. Once inside, Russell immediately went to the back bedroom and fell asleep. 10RP 513. No one heard Russell get up during the night. 10RP 514, 527. When she woke up around 8:00 a.m. the next morning, Russell was still wearing the same clothes he went to bed in. 10RP 513-14, 527.

C. ARGUMENT

1. RAMIREZ'S RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED BECAUSE INSUFFICIENT SUPPORTS THE FIRST DEGREE ROBBERY AND ATTEMPTED FIRST DEGREE ROBBERY CONVICTIONS.

First degree robbery may be committed by the alternative means of: 1) being armed with a deadly, 2) displaying what appears to be a firearm or other deadly weapon, 3) or infliction of bodily injury, any of

which must happen during commission of the robbery or in immediately flight therefrom. State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385, rev. denied, 113 Wn.2d 1030, 784 P.2d 530 (1989); RCW 9A.56.200(1)(a)(i-iii). There was insufficient evidence to support a finding that Ramirez, or an accomplice, displayed what appeared to be a firearm or other deadly weapon, during commission of the robbery.

Similarly, attempted first degree robbery requires proof beyond a reasonable doubt that Ramirez took a substantial step toward committing robbery and that he was armed with a deadly weapon, displayed what appeared to be a firearm or other deadly weapon, or inflicted bodily injury during the offense. RCW 9A.28.020; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i). There was insufficient evidence to support the alternative means that Ramirez, or an accomplice, displayed what appeared to be a firearm or other deadly weapon, during commission of the attempted robbery.

Due to insufficiency of evidence on one of the alternate means of committing the offenses for both these counts, the trial court needed to either instruct the jury that it must reach unanimous agreement as to the means or issue a special verdict form specifying the means relied upon. Reversal of the convictions is required because in the absence of these measures, there was no particularized expression of jury unanimity on

each of the alternative means of proving the first degree robbery and attempted first degree robbery.

a. A Conviction Must be Reversed Where There is Insufficient Evidence to Support an Alternative Means of Committing a Crime on Which the Jury was Instructed.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const., art. 1, § 22. "This right includes the right to an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). It is well established a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005). Sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. Ortega–Martinez, 124 Wn.2d at 707. "If the evidence is *sufficient* to support each of the alternative means

submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Id. at 707–08. "[I]f the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708.

The sufficient (substantial) evidence test[4] is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). "When one alternative means of a committing a crime has evidentiary support and another one does not, courts may not assume the jury relied unanimously on the supported means." State v. Woodlyn, __ Wn.2d __, 392 P.3d 1062, 1065 (2017).

[4] In conducting alternative means analyses, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence). Whatever the label, the test is the same.

b. The State Failed to Prove Ramirez Displayed What Appeared to be a Firearm or other Deadly Weapon During the First Degree Robbery.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). First degree robbery is an alternative means crime under RCW 9A.56.200(1)(a). In re Personal Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013); State v. Emery, 161 Wn. App. 172, 198-99, 253 P.3d 413, aff'd, 174 Wn.2d 741, 278 P.3d 653 (2012).

A person commits robbery when he "takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone." RCW 9A.56.190. Robbery in the first degree may be committed by three alternative means, when in the commission of the robbery or immediately flight therefrom, the defendant: "(i) is armed with a deadly weapon; or (ii) displays what appears to be a firearm or other deadly weapon, or (iii) inflicts bodily injury". RCW 9A.56.200(1)(a)(i-iii).

Looking at the evidence in the light most favorable to the State, the evidence establishes that bodily injury was inflicted during the first degree robbery. There was, however, insufficient evidence to support a finding of guilt on the alternative means that Ramirez displayed what appeared to be a firearm or other deadly weapon.

The court instructed the jury generally:

> A person commits the crime of Robbery when he unlawfully, and with intent to commit thereof, takes personal property from the person of another who owns or has a possessory interest in the property taken, against the person's will, by the use, or threatened use, of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.
>
> A person commits the crime of Robbery in the First Degree when in the commission of a robbery he is armed with a deadly weapon, or displays what appears to be a firearm or other deadly weapon, or inflicts bodily injury.

CP 78 (instruction 24).

The first degree robbery "to-convict" instruction required that each of the following elements be proven against Ramirez beyond a reasonable doubt:

> (1) That on or about October 24, 2015, the Defendant unlawfully took personal property from the person of Agustin Morales-Gamez;
> (2) That Agustin Morales-Games owned or had a possessory interest in the property taken by the Defendant;
> (3) That the Defendant intended to commit theft of the property;

(4) That the taking was against the person's will by the Defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
(5) That the force or fear was used by the Defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
(6) That in the commission of these acts the Defendant either:
(a) displayed what appeared to be a firearm or other deadly weapon; or
(b) inflicted bodily injury; and
(7) That this act occurred in the State of Washington.
....
To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 6(a) or (6)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 78-79 (instruction 27) (emphasis added). The "to convict" instruction thus presented the jury with the option of convicting Ramirez on two alternative means: displaying what appeared to be a firearm or other deadly weapon or inflicting bodily injury.

"Firearm" was defined in the jury instruction as "[a] weapon or device from which a projectile may be fired by an explosive such as gunpowder. A firearm, whether loaded or unloaded, is a deadly weapon." CP 76 (instruction 18). The term "deadly weapon" was not defined.[5] Jury instructions to which neither party objects become the law of the case and

[5] RCW 9A.04.110(6) defines "deadly weapon" to mean a "weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm."

delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hanes, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Ramirez objected to the absence of a deadly weapon definitional instruction or the definitional and to-convict instructions with regard to first degree robbery or attempted first degree robbery. These instructions became the law of this case.

In its failed attempt to meet its burden of proving that Ramirez "displayed what appeared to be a firearm or other deadly weapon," the State put on the testimony of four witnesses; complaining witnesses Morales-Gamez and Leiva-Aldana, as well as, Smith and Johnson; two eyewitnesses to the alleged robbery.

Smith testified she did not see a knife or gun in anyone's hands during the incident. 9RP 36, 38. Johnson also denied anyone had a knife or gun during the encounter or its immediate aftermath. 9RP 65-66, 75-76, 78, 83. Rather, Smith, Johnson, and Morales-Gamez testified that the encounter only involved punching and kicking. 9RP 19, 29, 46, 48, 63-64, 75, 79, 95-96, 127-28. Although Smith overheard one of the complaining witnesses say "pistol" and "cops" after the incident ended, those words were not accompanied by any gestures, explanations, descriptions, "or anything to help [Smith] understand." 9RP 20-21.

Morales-Gamez also denied that anyone had a gun, knife, or any other weapon during the alleged robbery incident. 9RP 95, 100, 127-28. Leiva-Aldana could only say that he "saw something dark". 10RP 95, 150. On direct-examination, Leiva-Aldana testified as follows:

> Q: Did you see if they [Ramirez] had anything in their hands while they were doing this?
> A: Yes. When they knocked down my - my buddy, I saw they had something like black, like a weapon.
> Q: You said it was like a weapon. What kind of a weapon was it like?
> A: Well, it just looked black. It was dark and you couldn't see really well.
> Q: Could you see if it was a knife or a gun?
> A: No. It was like a type of - a arm
> Q: Okay. Did they make any threats?
> A: Yes. They hit my compadre on his head with it.

10RP 95-96.

On re-direct examination, Leiva-Aldana further testified:

> Q: Did you see a gun in the hands of any of the attackers the first time?
> A: I said yes.
> Q: And did you tell the police that you saw a gun in the hands of one of the attackers?
> A: Yes.

10RP 145-46.

On re-cross examination however, Leiva-Aldana acknowledged that he could only say that he saw something "dark." The following exchange occurred:

Q: Mr. Leiva, on the 31st of October do you recall telling the police that, 'when Agustin was being attacked I saw something in the white guy's hand, but I couldn't tell what it was'?

A: Yes. But I saw it was something black and I was - told it was an arm.

Q: So let's talk about that a little bit. Okay. So you testified today that -- and the prosecutor said, did you see a gun, and you said yes?

A: Yes. I saw like a weapon, like an arm in his hand and I assumed it was a - an arm.

Q: Okay. Let's talk about that. So I think you indicated it was dark out; is that correct?

A: Yes, of course.

Q: Okay. Based on that statement that you've already admitted, it appears that you were not able to identify what it was; is that correct?

A: How?

Q: Okay. So I think you described as you saw something black; is that correct?

A: Yes.

Q: Okay. And you talked to Agustin and he thought it was something and he told you what he thought what it was; is that correct?

A: No. He told me it was a - he - no, he told me it was an arm.

Q: Okay.

A: And that is what they hit him on the head with.

Q: Okay. But you, based on what you saw, you can't say that you saw a - a firearm or a gun. You can only say that you saw something dark; is that correct?

A: That is true.

10RP 149-50.

This was the sole extent of the evidence put forth by the State to prove that Ramirez "displayed what appeared to be a firearm or other deadly weapon," during the alleged robbery. No evidence was presented that any gun or other weapon connected with the robbery was ever recovered. No medical testimony established that any of the injuries suffered by Morales-Gamez and Leiva-Aldana during the robbery were consistent with having been caused by a gun or other weapon. None of the witnesses indicated that Ramirez or Russell threatened to use a firearm or other deadly weapon during the robbery. No evidence was presented that the "dark" object was an instrument capable of causing death or substantial bodily harm under RCW 9A.04.110(6). Significantly, the jury also declined to return a special verdict finding that Ramirez was armed with a firearm during the alleged robbery and attempted robbery. CP 94, 96.

In cases where courts have found sufficient evidence that a defendant was armed even though witnesses did not see a weapon, there was evidence that the police later recovered the actual weapon. See e.g. State v. Randle, 47 Wn. App. 232, 235-36, 734 P.2d 51 (1987) (defendant's accomplice was 'armed' for purposes of first degree burglary where he had loaded pistol in shirt pocket during burglary; one need not necessarily display weapon or be in actual physical possession to be

armed), rev. denied, 110 Wn.2d 1008 (1988); State v. Sabala, 44 Wn. App. 444, 447-48, 723 P.2d 5 (1986) (defendant 'armed' for purposes of sentence enhancement where loaded semi-automatic gun found under driver's seat). And conversely, in cases where the actual weapon was not recovered, there has been testimony from eye witnesses who were able to describe the weapon in detail. See e.g. State v. Mathe, 35 Wn. App. 572, 580-82, 668 P.2d 599 (1983) (Evidence sufficient where police did not recover the guns that were allegedly used in the first degree robberies but the victims saw the guns and described them in detail), aff'd, 102 Wn.2d 537, 688 P.2d 859 (1984)

Here, there is neither witness identification of a gun or other deadly weapon, nor later police recovery of a gun or other deadly weapon. In short, while the evidence arguably showed that Leiva-Aldana saw something "dark" in either the hand of Russell or Ramirez during the incident, this evidence was insufficient to prove beyond a reasonable doubt that the "dark" object was either a firearm, what appeared to be a firearm, or any other object that satisfied the legal definition of "deadly weapon."

In re Personal Restraint of Bratz, 101 Wn. App. 662, 5 P.3d 759 (2000) is instructive. Bratz walked into a bank and told the teller he had nitroglycerin in his coat and would "blow up the bank" if he was not given

money. Bratz was charged with first degree robbery on the alternative means of either being armed with a deadly weapon or displaying what appeared to be a deadly weapon. Bratz, 101 Wn. App. at 664-65.

This Court concluded that the evidence was insufficient to prove Bratz ever possessed nitroglycerin, and thus, was "armed with a deadly weapon." This Court noted that Bratz did not show the alleged substance to anyone and police did not recover any nitroglycerin when they arrested Bratz one block away a few minutes after the robbery. As this Court explained, "While it is theoretically possible that Bratz might have carefully disposed of the nitroglycerin (without exploding the highly volatile compound) in the brief interim between the robbery and his apprehension, such a conclusion stretches the bounds of reason. Bratz, 101 Wn. App. at 674.

This Court likewise rejected the notion that Bratz's verbal threat to "blow up the bank" was sufficient to prove the element of "displaying what appeared to be a deadly weapon." As the Court explained, the mere threatened use of a deadly weapon in the commission of a robbery, without any physical manifestation indicating a weapon, was insufficient to prove first degree robbery. Bratz, 101 Wn. App. at 675-76.

Like Bratz, here there is insufficient evidence to conclude Ramirez committed first degree robbery based on the alternative means of

"displayed what appeared to be a firearm or other deadly weapon". There was no jury instruction requiring jury unanimity on the alternative means. On the contrary, the "to convict" instructions informed jurors that they did not need to be unanimous on the alternative means of committing the offense. CP 78-79 (instruction 27). There was no special verdict specifying which of the alternative means the jury found. Further, in closing arguments, the State argued that the jury could find Ramirez guilty based on either alternate ground. 10RP 641. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing Ortega-Martinez, 124 Wn.2d at 708). Because the evidence is insufficient to prove that Ramirez "displayed what appeared to be a firearm or other deadly weapon" the conviction for first degree robbery must be reversed.

c. The State Failed to Prove Ramirez Displayed What Appeared to be a Firearm or other Deadly Weapon During the Attempted First Degree Robbery.

The evidence is similarly insufficient to prove that Ramirez "displayed what appeared to be a firearm or other deadly weapon" during the attempted first degree robbery of Leiva-Aldana.

To prove an attempt to commit a crime, the State must prove the defendant, while acting "with intent to commit a specific crime,"

performed "any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). To be a substantial step, conduct must be more than preparation and strongly corroborative of the defendant's criminal purpose. State v. Workman, 90 Wn.2d 443, 449-52, 584 P.2d 382 (1978). Whether conduct constitutes a substantial step and when conduct becomes more than mere preparation depend on the facts of the case and are questions for the trier of fact. Workman, 90 Wn.2d at 449-50.

As charged, the completed crime of first degree robbery required proof that Ramirez, in the commission or immediate flight from the robbery, inflicted bodily injury or "displayed what appeared to be a firearm or other deadly weapon". CP 43; RCW 9A.56.190; RCW 9A.56.200. And, a defendant commits the crime of attempted robbery in the first degree when he, with intent to commit robbery in the first degree, does any act which is a substantial step toward commission of that crime. CP 43, 79-80 (instruction 31); RCW 9A.28.020(1).

In order to convict Ramirez of attempted first degree robbery as charged in this case, the State was therefore required to prove, among other things, that he intended to commit robbery by displaying what appeared to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a)(ii); CP 43. Unless jurors were required to find Ramirez

attempted to commit robbery by one of the charged alternative means of first degree robbery, the jury's verdict would only satisfy a conviction for attempted second degree robbery.[6] Put another way, if the State need only prove whether Ramirez acted with intent to commit theft of personal property and whether he took a substantial step toward accomplishing that result and not the means by which he attempted to do so, the State could obtain a conviction of attempted first degree robbery by proving nothing more than attempted second degree robbery. Thus, the means by which an individual commits first degree robbery are relevant to a charge of attempt because the jury's unanimous agreement as to the means of first degree robbery are what allows for a conviction on the greater charge.

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003), is instructive. In DeRyke, the Supreme Court found reversal was not required where the elements of first degree rape were not included in the attempt to convict instruction, but instead included in a separate instruction. Id. at 910-11. The court held it was error for the to convict instruction not to specify the degree of rape allegedly attempted, but that this error was harmless because the jurors were only instructed on first degree rape and therefore "had no occasion to confuse the various degrees

[6] An individual is guilty of second degree robbery when he "commits robbery," which is the unlawful taking of personal property from another by the use of force or threat. RCW 9A.56.210(1); RCW 9A.56.190.

of rape." DeRyke, 149 Wn.2d at 913-14. The Court held, "[i]t is elementary that a person cannot be convicted of rape per se, but only of a specific degree of rape" and determined the conviction demonstrated "DeRyke committed an act that could have constituted a substantial step toward the commission of attempted first degree rape, i.e. kidnapping." DeRyke, 149 Wn.2d at 913. Thus, just as the jury was required to find DeRyke took a substantial step toward committing first degree rape by a particular method (kidnapping), the jury in Ramirez's case was required to find he took a substantial step toward committing robbery in the first degree, either because he inflicted bodily injury or displayed what appeared to be a firearm or other deadly weapon.

As discussed above, there was insufficient evidence that a firearm or other deadly weapon was displayed during the first degree robbery. The attempted first degree robbery arose from the same incident involving the same complaining witnesses. Ramirez's right to a unanimous jury verdict on the attempted first degree robbery was also violated because the evidence is similarly insufficient to prove that Ramirez "displayed what appeared to be a firearm or other deadly weapon" during the attempted first degree robbery of Leiva-Aldana.

2. RAMIREZ'S RIGHT TO A FAIR TRIAL WAS UNFAIRLY PREJUDICED WHEN HIS CASE WAS JOINED FOR TRIAL WITH THE CO-DEFENDANTS

The trial court erred in joining Ramirez's case with that of Russell and Galeana's in a single criminal trial. A proper balancing of the requisite factors shows joinder presented an undue risk of prejudice to Ramirez's right to a fair trial. For the same reasons, the trial court also erred in subsequently denying Ramirez's motions to sever his case from that of Russell and Galeana. Ramirez's convictions should be reversed for this reason.

a. Procedural History and Issue Preservation.

Before trial, the State moved to join Ramirez's case with Russell's and Galeana's into a single criminal trial. Supp. CP ___ (sub no. 13, Motion & Declaration for Joinder of Defendants, filed 12/8/15); 1RP 5-6. The State argued that although Ramirez was not charged for the shooting incident, the evidence for both separate incidents "overlap[ed]" and was relevant to establishing motive. 1RP 5-6.

Defense counsel objected to the joinder. Supp. CP ___ (sub no. 27, Notice of Defense Objection to Joinder of Defendants and Continuance of Trial Date, filed 12/28/15); Supp. CP ___ (sub no. 28, Defense Brief Objecting to Joinder and Continuance of Trial, filed 12/8/15); CP 13-15; 1RP 6-11. Ramirez argued there was a gross

disparity of State's evidence against him as compared with Galeana and Russell. Ramirez noted for example, that no witnesses had identified him as being involved. 1RP 8-12.

The trial court acknowledged that results of the DNA testing on the knife was important:

> If it matches up there's, you know, his blood on the knife and the sweatshirt and his testing that's pretty strong evidence against him [Ramirez]. On the other hand, if it comes back not as a match you have some pretty powerful exculpatory evidence that he must not have been on the scene, right.

1RP 9-10. The trial court nonetheless granted joinder, ruling that judicial economy, motive evidence, and overlap of the "whole situation" supported a single trial for all defendants on all charged crimes. 1RP 21-23; CP 16. The trial court noted however, that it was leaving the issue of separate trials "open" for "further consideration" based on what DNA testing of the knife revealed. 1RP 22-23. As the trial court explained, "If [Ramirez] comes back and -- a negative on the sweatshirt and his blood to the knife, I think the case is substantially weak and maybe that's a situation where that case could be tried separately." 1RP 21-22.

Ramirez subsequently moved to sever his case from Russell's and Galeana's after testing revealed that Ramirez's DNA was not on the knife used during the alleged robbery. CP 17-19; 2RP 2; 4RP 68, 84-100. The

State opposed the motion to sever. Supp. CP ___ (sub no. 61, Memorandum of Authorities re: Motion to Sever, filed 4/5/16); 4RP 93-97.

In arguing the motion to sever, defense counsel reiterated that there was a gross disparity in the weight of the State's evidence as to each defendant, especially in light of the negative DNA testing results. Ramirez reminded the trial court that it previously favored severance if the DNA testing results were negative as to Ramirez. 4RP 99.

Ramirez also noted that the jury would have a difficult time compartmentalizing the evidence given the number of charges and defendants. Ramirez argued the similarity of the charges invited the jury to cumulative evidence and infer criminal disposition. 4RP 84-85. Ramirez also disputed that in a separate trial evidence of the shooting would be cross-admissible because it would be irrelevant as it related to Ramirez's involvement in the alleged robbery. 4RP 85-89, 98-100.

Galeana's attorney joined in the motion to sever, explaining, "I think this is a classic boot strapping case where the State is trying to tie together -- as [Ramirez] just said, tie together I think two separate incidents and trying to bolster the evidence going both ways against my client and against [Ramirez] as well." 4RP 90.

The State maintained joinder of the charges and defendants was appropriate because of judicial economy, establishing motive and identity, and the cross-admissibility of the evidence. 4RP 93-98; Supp. CP __ (sub no. 29, State's Response to Defense Motion to Sever, dated 11/22/13, at 1-6).

The trial court denied Ramirez's motion to sever his case from Russell's and Galeana's on April 22, 2016. 4RP 101-04. The trial court concluded that there was not a gross disparity of evidence against each defendant, and that "whole story was tied together" and would be told regardless of whether the cases were severed. 4RP 101-04.

Ramirez renewed his motion to sever on June 16, 2016. 1RP 35-36. On June 22, 2016, the trial court entered a written order denying Ramirez's renewed motion to sever his case. CP 57.

b. Joinder and Severance Generally.

Although separate doctrines, joinder and severance are closely related. State v. Bluford, __ Wn.2d __ , 393 P.3d 1219, 1223-25 (2017). Because joinder and severance are based on the same underlying principle that the defendant must receive a fair trial untainted by undue prejudice, the legal issues of joinder and severance cannot be decided in a vacuum without considering prejudice. State v. Bryant, 89 Wn. App. 857, 865,

950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999).

After identifying whether joinder is allowable, the trial court should balance the likelihood of prejudice to the defendant against the benefits of joinder in light of the particular offenses and evidence at issues and carefully articulate the reasoning underlying its decision. Bluford, 393 P.3d at 1226. "'[I]f joinder will cause clear, undue prejudice to the defendant's substantial rights, no amount of judicial economy can justify requiring a defendant to endure an unfair trial.'" Bluford, 393 P.3d at 1226 (quoting State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968)).

c. Consideration of the Relevant Factors Shows Joinder Prejudiced the Fairness of the Trial.

CrR 4.3(b) provides when two or more defendants may be joined in the same charging document. The rule provides in pertinent part, that defendants may be joined when:

> When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
>
> (i) were part of a common scheme or plan; or
>
> (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

CrR 4.3(b)(3).

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may be present in a '"latent feeling of hostility engendered by the charging of several crimes as distinct from only one.'" Harris, 36 Wn. App. at 750 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

Precedent and fundamental principles dictate that "'the joinder of counts should never be utilized in such a way as to unduly embarrass or prejudice one charged with a crime, or deny him a substantial right.'" Bluford, 393 P.3d at 1225 (quoting Smith, 74 Wn.2d 754-55). "'Thus, even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant.'" Bluford, 393 P.3d at 1225 (quoting Bryant, 89 Wn. App. at 865).

There are four factors courts must consider when determining whether joinder causes undue prejudice: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each

count; (3) the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) admissibility of the evidence of the other crimes. Bluford, 393 P.3d at 1226. The central dispute in Ramirez's case turns on the disparity of the strength of the State's evidence in Ramirez's compared with Russell and Galeana, whether the evidence was cross-admissible, and whether the jury could be expected to compartmentalize the evidence. Factors which may mitigate the prejudicial effect are not sufficient in this case.

i. strength of evidence and clarity of defenses

By the prosecutor's own admission, the State's case against Ramirez was "...a circumstantial one, and that's why I joined these cases[.]" 11RP 3; See also 4RP 64; 10RP 501-02. The relative strength of evidence against Ramirez and the other two co-defendants was not equal.

Ramirez was not charged or involved in the shooting incident that Russell and Galeana were convicted of. Neither the witnesses to the assault, nor the complaining witnesses themselves, could identify Ramirez as being involved in the assault and robbery with which he was charged. Unlike Russell and Galeana, no one was able to identify Ramirez in court, in a photo montage, or even in the surveillance video played for the jury. The cellphone allegedly taken from Morales-Gamez was not found in Ramirez's possession. Although Ramirez was stabbed in the stomach,

DNA testing revealed that Morales-Gamez's knife was not the one that inflicted the injury to Ramirez. 10RP 459-61.

Significantly, in addressing whether the cases should be joined for trial, the court did not find that the relative strength of evidence for each defendant was equal. To the contrary, the trial court noted that if DNA testing on the knife did not reveal a match to Ramirez, "I think the case is substantially weak and maybe there's a situation where that case should be tried separately." 1RP 22. Despite the knife subsequently testing negative for Ramirez's DNA, the court still joined the cases for trial. CP 16.

Identity and general denial was a defense for each defendant on all the counts. Courts have found the same defense to weigh against severance. See, e.g., State v. McDaniel, 155 Wn. App. 829, 861, 230 P.3d 245, rev. denied, 169 Wn.2d 1027, 241 P.3d 413 (2010). The Supreme Court, however, has found distinct defenses to weight against severance. State v. Bythrow, 114 Wn.2d 713, 721, 790 P.2d 154 (1990) (defense of alibi for one robbery, defense of ignorance that companion was going to commit robbery for the other). So either this factor is a no-win scenario for Ramirez or there is a conflict in the case law. In any event, no one factor is dispositive. McDaniel, 155 Wn. App. at 860.

ii. effect of instruction to decide each count separately.

The third factor supports separate trials despite instruction informing the jury it must "separately decide each count charged against each defendant." CP 73 (instruction 4). The jury's ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721. In Bythrow, the court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, and the issues and defenses were distinct. Id. at 723. On that basis, the reviewing court concluded the jury was likely not influenced by evidence of multiple crimes and refusal to sever was not error. Id.

Unlike in Bythrow, the jury in this case was unlikely to compartmentalize the evidence of the different counts pertaining to the different defendants. First, the trial spanned one week, during which the State called 20 different witnesses, including the complaining witnesses, several of their neighbors, eight police officers, and number of expert witnesses. Moreover, testimony on the different counts was not presented in sequence, with testimony of various witnesses jumping from incident to

incident. Several of the officers were called to the stand to testify about one incident or piece of evidence, excused, and then after several days recalled to testify about different incidents or evidence. Given the length of trial, non-sequential testimony, multiple witnesses, and two separate incidents involving 12 criminal counts and three different defendants, the jury was likely to infer Ramirez had a criminal disposition. At the very least, trying multiple charges committed by separate defendants together necessarily engendered a latent feeling of hostility toward Ramirez.

Further, even where the jury is instructed to consider each count separately, the jury is still free to consider evidence from one count in deciding another count. State v. Bradford, 60 Wn. App. 857, 860-62, 808 P.2d 174 (1991) (instruction that "The jury is free to determine the use to which it will put evidence presented during trial" was consistent with instruction that jury was to consider each count separately), rev. denied, 117 Wn.2d 1003, 815 P.2d 266 (1991). The boilerplate instruction does not actually require the jury to compartmentalize the evidence. CP 73 (instruction 4). The jury, meanwhile, was also instructed that in deciding whether any proposition has been proved, "you must consider all of the evidence" admitted "that relates to the proposition." CP 71 (Instruction 1). Such instruction gives jurors nearly limitless discretion in deciding

whether evidence on one count, against one defendant, bears on another count, against another defendant.

The jury was not instructed that it must not consider the evidence on any given count as evidence of a propensity to commit the other charged crimes involving different victims. See State v. Gresham, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012) ("An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character."). By joining the charges, the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose. See Bean, 163 F.3d at 1084 (9th Cir. 1998) (in holding joinder resulted in unfair trial, pointing out jury instructions, including instruction to consider each count separately, "did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other"). The instruction to weigh each count separately does not weigh in favor of joinder due to the length and complexity of the trial, and the lack of a limiting instruction preventing the jury from using the multiple counts for propensity purposes.

iii. cross-admissibility of evidence.

The fourth factor — cross-admissibility of evidence — favored separate trials. Here, the trial court determined that much of the evidence would be cross-admissible to prove motive. 1RP 21-22.

The trial court's reasoning demonstrates precisely why Ramirez was unfairly prejudiced by joinder in this case. Ramirez's involvement in this case ended with his hospitalization after the alleged robbery incident. Thus, all the evidence stemming from the shooting that happened after the fact, and for events for which Ramirez was not charged, was not relevant to his case because it did not make the existence of any fact of consequence more or less probable as it related to his specific charges.[7] Put another way, the unfair prejudice to Ramirez stems from the fact that at a separate trial, all the evidence of the shooting incident could have been entirely omitted, and the jury would still have heard all the evidence relating to his specific charges.

By combining Ramirez's trial with Russell's and Galeana's, and therefore permitting the introduction of evidence which would otherwise be irrelevant to Ramirez's charges, the trial court created a great danger

[7] "'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

that the jury may have cumulated evidence of all the crimes of all the defendants to find Ramirez guilty.

Even assuming evidence of the separate crimes involving separate defendants would be relevant, other acts evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), rev. denied, 108 Wn.2d 1003 (1987). Evidence is unfairly prejudicial when it is "likely to arouse an emotional response rather than a rational decision among the jurors." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987); accord State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997). For the reasons discussed above, a separate trial for Ramirez may very well have necessitated a finding that any evidence pertaining to the shooting was irrelevant, unfairly prejudicial, and therefore not cross-admissible, in Ramirez's case.

Under the circumstances, Ramirez meets his burden of demonstrating a single trial involving Russell and Galeana was so manifestly prejudicial as to outweigh the concern for judicial economy. Bythrow, 114 Wn.2d at 718. To ensure a fair trial, the charges should not have been joined. Ramirez's convictions should be reversed.

d. Consideration of the Relevant Factors Shows the Denial of Ramirez's Motion to Sever Prejudiced the Fairness of the Trial.

Even if properly joined for trial, a court should nonetheless sever the trials of joined defendants where severance is necessary to promote a fair determination of guilt. State v. Moses, 193 Wn. App. 341, 360, 372 P.3d 147 (quoting State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (1985), rev. denied, 186 Wn.2d 1007, 380 P.3d 440 (2016). Under CrR 4.4(c)(2):

> The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:
>
> (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
>
> (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

A defendant's motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2).

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24

(1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed judicial economy concerns. The appellant must point to specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983). Specific prejudice may be demonstrated by:

> (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)), rev. denied, 128 Wn.2d 1025 (1996).

The trial court's reasoning for denying Ramirez's request for a severance largely mirrored its reasoning for joining the cases for trial. 4RP 101-04. Thus, the same factored analysis articulated above applies with equal force to the trial court's denial of Ramirez's severance motion.

For all the reasons discussed above, there was great a disparity of strength of evidence between Ramirez's case and that of his co-defendants. There was a very real danger that the jury cumulated all the evidence of crimes to find guilt, or at the very least, infer that Ramirez had a criminal disposition based on his association with Russell and Galeana. At the very least, trying the charges together necessarily engendered a latent feeling of hostility toward Ramirez. Any single factor favoring joinder was insufficient to mitigate the prejudice inherent in trying these counts together. Because the unfair prejudice to Ramirez outweighed the judicial economy of joint trials, severance should have been granted. The court abused its discretion in denying severance and Ramirez's convictions must be reversed. Bythrow, 114 Wn.2d at 717.

3. THE ADMISSION OF TESTIMONIAL CELLPHONE TESTING AND EXPERT CERTIFICATION RESULTS VIOLATED RAMIREZ'S RIGHT TO CONFRONT WITNESSES AGAINST HIM

a. Procedural History.

Before trial, the State sought to admit the results of forensic testing done on the cellphone found at the scene of the alleged robbery. Because the Aberdeen Police Department was incapable of performing data extraction in a "conventional manner", the cellphone was sent to Utah so that Dixie State College could perform a specialized forensic test called a "chip-off". 4RP

111-28; 10RP 18-19. The "chip-off" testing procedure required the memory chip of the phone to be removed using soldering, plugging the memory chip into an adaptor to create a binary copy of the phone's data, and then translating the binary information into "human readable user data" through use of processing software. 5RP 40; 10RP 26; Supp. CP ___ (sub no. 71, Motion in Limine re: Admissibility of Cell Phone Data, filed 6/22/16).

William Matthews performed the forensic "chip-off" testing at Dixie State and generated the report regarding the testing results. 4RP 114; Exs. 42, 52-53, 58, 62-65, 77. Between completion of the testing and trial however, Matthews had been fired from Dixie State for misappropriating resources during his time as lab director. 5RP 4-5; 10RP 50-51, 74. During that interim period, the State had lost track of Matthews whereabouts and was unable to secure his presence for trial. 5RP 4-5.

The State sought to introduce Matthews' written report and conclusions through Detective Cox and, Joan Runs Through, another forensic examiner at Dixie State. The State argued this testimony and introduction of testing results did not violate Ramirez's confrontation rights because Matthews' testing and report did not inculpate Ramirez; rather it was Cox's interpretation of that data that inculpated Ramirez. 4RP 112, 115-16,

127-28; 5RP 4-8; Supp. CP ___ (sub no. 71, Motion in Limine re: Admissibility of Cell Phone Data, filed 6/22/16).[8]

Ramirez objected to the State's proposed use of Cox and Runs Through as surrogate trial witnesses, and argued that introducing the "chip-off" testing procedure and forensic results through any witness other than Matthews would violate Ramirez's confrontation rights. CP 48-53; 4RP 118-21; 5RP 15-16, 52-54.

Runs Through testified about the "chip-off" procedure during a pretrial hearing regarding the admissibility of Matthews' testing results. See 5RP 38-51. Following Runs Through pretrial testimony, the trial court concluded that the State would need to present in-person expert testimony in order to admit the results of the forensic "chip-off".[9] The trial court explained its ruling as follows:

> Here's my ruling. As I already indicated I believe that the defense has the right to confront a witness on this situation. Because I -- I don't know of any case that would allow me just to say, the data comes to Detective Cox, who is not an expert at all in computers, and that he can just go

[8] Although initially the State also seemed to argue that Matthews' reports could be properly authenticated through a CrR 6.13 certificate, the prosecutor later acknowledged, "this is not a 6.13 issue." 4RP 112, 115-16, 127-28; 5RP 14. Thus, the trial court did not admit Runs Through's testimony, or Matthews' written documents on this basis.

[9] Initially, the State sought to have Runs Through testify via Skype. Following Runs Through's pretrial testimony however, the trial court ruled this process was insufficient and ordered the witness to appear and testify in person. 5RP 52-54, 59-61.

> forward with the data and lay some sort of foundation and have it admitted. So we do need an expert.
>
> My number one preference would be to get the expert that did it. I think that's what the commentators recommend, number one. And it's kind of a very hotly-debated area of the law, as you can see from reading the *Lui*[10] decision and other decisions.
>
> But, you know, I'm allowing if you can't find him [Matthews] to bring him out, then bring her [Runs Through] out to testify.

5RP 58-59.

b. The Right to Confront Witnesses.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This is so regardless of whether a document falls within a firmly rooted hearsay exception. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

The state has the burden of establishing a non-testifying witness's statements are nontestimonial. State v. Mares, 160 Wn. App. 558, 562, 248

[10] State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014).

P.3d 140 (2011). An alleged confrontation violation is reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

c. The Cellphone Testing Results are Testimonial Evidence.

Various formulation of testimonial statements exist, including pretrial statements that declarants would reasonably expect to be used prosecutorially. Crawford, 541 U.S. at 51. The Crawford Court explained that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial. 541 U.S. at 52. Statements made to "establish or prove past events potentially relevant to later criminal prosecution" also qualify as testimonial. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). More recently, in Melendez-Diaz v. Massachusetts, the United States Supreme Court concluded that a lab technician's certification prepared in connection with a criminal drug prosecution was testimonial and its admission at trial without the lab technicians testimony violated the Confrontation Clause. 557 U.S. 305, 319-24, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Similarly, in Bullcoming v. New Mexico, the Supreme Court held that "A document created solely for an 'evidentiary purpose'...made in aid of a police investigation, ranks as testimonial." 564 U.S. 647, 664,

131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) (quoting Melendez-Diaz, 557 U.S. at 317-20).

Here the report generated by Matthews and Dixie State regarding the cellphone is testimonial evidence because an objective witness would reasonably conclude that it was specifically created for evidentiary purposes in anticipate of litigation. Melendez-Diaz and Bullcoming are instructive in this regard.

Melendez-Diaz was convicted of distributing and trafficking cocaine. At trial, the State introduced three "certificates of analysis" reporting that forensic analysis revealed "[t]he substance [possessed by Melendez-Diaz] was found to contain: Cocaine." Melendez-Diaz, 557 U.S. at 308-09. The certificates were issued by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health and were sworn in front of a notary public. Id.

The Supreme Court concluded under a "rather straightforward" application of Crawford that the certificates were inadmissible. Melendez-Diaz, 557 U.S. at 311-12. After determining the certificates were "quite plainly affidavits," the Court held that they constituted "testimonial" statements because they were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Melendez-Diaz, 557 U.S. at 310-11 (quoting Davis, 547 U.S. at 830).

In so holding the Court emphasized not only the form of the certificates, but also their content and the purpose for which they were created: "...for the sole purpose of providing evidence against a defendant." Melendez-Diaz, 557 U.S. at 323. Consequently, the analysts were "witnesses" for Confrontation Clause purposes and Melendez-Diaz had the right to confront them. Because he was not given this opportunity, the evidence should not have been admitted. Melendez-Diaz, 557 U.S. at 311. The Court concluded, "The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." Melendez-Diaz, 557 U.S. at 329.

In Bullcoming, the state introduced a certificate recording the defendant's blood alcohol level (BAL) at 0.21 grams per hundred milliliters through a coworker of the laboratory analyst who had not observed nor reviewed the actual testing. 564 U.S. at 651-53. The test was run on a gas chromatograph machine, the operation of which required specialized knowledge and training. Id. at 653.

Again, the Court declared the evidence inadmissible based on the reasoning of Melendez–Diaz. The Court drew parallels to Melendez–Diaz, noting that the certificate had an "'evidentiary purpose,'" that it was created "in aid of a police investigation," and that it was formalized.

Bullcoming, 564 U.S. at 663-64 (quoting Melendez-Diaz, 557 U.S. at 310). Therefore, the certificate was testimonial, which left the Court to determine whether the State had satisfied its confrontation clause burden. It had not; the witness had not participated in the test and could not speak to the procedures used or observations made. Bullcoming, 564 U.S. at 657-59. The witness had no function except as a "surrogate," merely relaying the conclusions of another. Id. at 651-52.

Washington has now applied the principles of Melendez-Diaz and Bullcoming, specifically in the context of Department of Licensing records. See Jasper, 174 Wn.2d at 111-16. In Jasper, the court held that certifications declaring the existence or non-existence of public records are testimonial statements subject to the constitutional right to confront witnesses. Id. at 100. The court explained that testimony is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 109 (quoting Crawford, 541 U.S. at 51). The court concluded that the certifications required the right to confront the witness who created them because, "They were created, and in fact used, for the sole purpose of establishing critical facts at trial," and "Because each certificate was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be

available for use at a later trial.'" Jasper, 174 Wn.2d at 115 (quoting Melendez–Diaz, 129 S. Ct. at 2532).

When applied here, these cases show the cellphone report is unquestionably testimonial. The testing and accompanying report was specifically requested by the Aberdeen Police Department to aid their investigation and created solely for purposes of gathering evidence for Ramirez's trial. The testing was admitted for the truth of the matter asserted in the report. Indeed, by Runs Through own admission, cellphone testing done by Dixie State is "done in preparation for litigation" and the reports produced are "sent to primarily law enforcement agencies." 10RP 52-56.

The trial court correctly concluded that the Confrontation Clause was implicated and that Ramirez was entitled confront a witness regarding the cellphone testing and report. The court erred however, when it concluded the right to confrontation could be satisfied through the testimony of a surrogate witness. 5RP 58-59.

d. Admission of the Cellphone Testing Results without the Examiner's Testimony Violates the Confrontation Clause.

Here, the cellphone testing was done by Matthews, who also generated the report regarding the testing results. Yet, the State did not secure Matthews' presence for trial. The surrogate witness, Runs Through, testified about the cellphone testing results even though she had never

seen the phone, did not personally conduct the phone analysis, did not assist Matthews in his analysis, and "didn't do any independent work to essentially check his [Matthews] work on this phone relating to this case[.]" 10RP 33, 42, 45, 51, 53, 71, 89-90.

As Melendez-Diaz and Bullcoming make clear, the fact that Ramirez was allowed to cross-examine a surrogate witness regarding the process and results of the cellphone testing does not remedy the confrontation clause violation.

In reaching the conclusion that lab certificates could not be admitted without the analysts testifying in person, the Melendez-Diaz Court focused heavily on the fact that "serious deficiencies" existed in forensic evidence used in criminal trials. 557 U.S. at 319. As the Court explained, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." Id. The Court noted that confrontation of the forensic tester and cross-examination of their training, honesty, proficiency, and methodology was vitally important to "assuring accurate forensic analysis." 557 U.S. at 318-20.

Similarly, the Bullcoming Court emphasized that cross-examination of a surrogate witness cannot convey what the testing analyst knew or observed about the events her report concerned, and cannot "expose any lapse or lies" by the analyst. Id. at 661-63. The Court

explained that the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Bullcoming, 564 U.S. at 662. Furthermore, substituting a witness who can comment on work done by someone else but who did not personally test the substance or observe the testing as it occurred does not serve the purposes of confrontation, even when the "comparative reliability of an analyst's testimonial report [is] drawn from machine produced data." Id. at 661-62. "Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" Bullcoming, 564 U.S. at 661 (quoting Melendez-Diaz, 557 U.S. at 319, n.6).

As in Melendez-Diaz and Bullcoming, here the testimony of surrogate witness Runs Through did not serve the purpose of confrontation and does nothing to "assure the accurate forensic analysis" conducted by Matthews. Runs Through had never seen the phone and did not assist Matthews in the testing. Yet, she was permitted to testify about the process Matthews' purportedly used and the results he reached. Although the prosecutor maintained that the testing performed by Matthew was "as easy as plugging a phone into a computer that we all do every day" that

assessment is belied by the record. 5RP 11-12. First, as the trial court properly recognized, "if was that easy *[sic]* the Aberdeen police would have done it." 5RP 12. Second, Runs Through pretrial foundational testimony establishes that the "chip-off" testing process was hardly easy or routine. Runs Through explained the process as follows:

> We take the memory chip out. This takes quite a bit of heat because we have to not just melt the solder, but there's also epoxy around it. Chips are rated to about 500 degrees Fahrenheit. We have to stay below that heat. We take the chip off, we put it into an adapter, connect it to a program and use the program in a read only mode to transfer a bit-for-bit copy, a binary copy, of that chip. We then take that binary image, put it into software such as Cell Bright's physical analyzer and the software will parse that binary information into human readable user data.

5RP 40; 10RP 26. Moreover, during the "chip-off" process the tester had several "discretionary" decisions to make, including the size of the chip, the software used, and the scripts that are run on the chip. 5RP 48. Because Runs Through did not personally conduct or witness the cellphone testing, Ramirez was deprived of the opportunity to cross-examine Matthews about these discretionary decisions and how they may have influenced the testing outcome. As the trial court recognized, cross-examination about the manner of the cellphone testing was vital to the defense. 5RP 21.

The absence of Matthews' presence at trial also deprived the defense an opportunity to directly impeach his credibility with evidence that he had been fired from Dixie State because of financial impropriety. 10RP 50-51, 73-74. Evidence of Matthews' termination for misappropriating lab funds was impeachment evidence because it was probative of his character for untruthfulness.[11] Although Runs Through testified about Matthews firing, she was unable to answer other critical questions such as whether the financial impropriety affected Matthews work and what an independent review of his lab work revealed. 10RP 75-76, 78-79, 89.

Despite the clear mandate of Melendez-Diaz and Bullcoming, the State may nonetheless argue, as it did at trial, that a different result in this case is dictated by State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014). 5RP 6-8. Such an argument should be rejected for several reasons.

Lui was charged with murder for allegedly strangling his girlfriend. Lui, 179 Wn.2d at 463-64. Associate medical examiner, Kathy Raven, performed an autopsy and prepared a written report, explaining her conclusions. At trial, Raven was unavailable to testify. Instead, the State

[11] Crimes involving theft are relevant to determining an individual's veracity in other contexts, such as to impeach their trial testimony under ER 609(a)(2), because theft contains the element of intent to deprive another of his or her property, and that intent involves dishonesty. State v. Schroeder, 67 Wn. App. 110, 115, 834 P.2d 105 (1999).

presented expert testimony from chief medical examiner, Richard Harruff. Harruff testified that he reviewed Raven's report, as well as, all the supporting evidence. Harruff also discussed the case with Raven and testified he agreed with her conclusion about strangulation. Harruff added that he had cosigned Raven's report and would not have done so unless he completed agreed with her conclusions. Harruff also testified to the conclusions of a toxicology report prepared by another analyst and to temperature readings of the deceased's body taken by another doctor, which Harruff then used to estimate a range for the time of death. Lui, 179 Wn.2d at 464-65.

Additionally, Gina Pineda, supervisor of a DNA laboratory, testified regarding DNA testing she had not performed. Pineda did not personally participate in or observe the tests, noting that since assuming her director role, she had "stepped away from the lab," although she did use the electronic data produced during the testing process to create a DNA profile that reflected "[her] own interpretation and [her] own conclusions ..." Lui, 179 Wn.2d at 466. She offered a document summarizing the test results, which the trial court admitted solely for illustrative purposes, ruling that Pineda could refer to it during her presentation but that it would not go back to the jury room. Pineda testified that based on the results of these tests, she could not eliminate Lui

or Lui's son as a major donor of the male DNA found on the decedent's shoelaces or vaginal swab. Lui, 179 Wn.2d at 465-66.

On appeal, Lui argued that admission of the autopsy, toxicology, temperature readings, and DNA testing results violated his right to confrontation. Lui, 179 Wn.2d at 467, 507. In addressing Lui's arguments, the Court "adopt[ed]a rule" that "an expert comes within the scope of the confrontation clause if two conditions are satisfied: first, the person must be a 'witness' by virtue of making a statement of fact to the tribunal and, second the person must be a witness 'against' the defendant by making a statement that tends to inculpate the accused." Lui, 179 Wn.2d at 462, 480-82. Analyzing each of piece of evidence individually under the new rule, the Supreme Court concluded that some of the evidence presented did violate Lui's right to confrontation. Lui, 179 Wn.2d at 463, 486.

Addressing the DNA and temperate reading tests, the court held there was no confrontation violation in each instance the testifying witness had brought his or her expertise to bear on the data compiled by others in order to reach the conclusion presented to the jury. Regarding the DNA evidence presented through supervisor Pineda, rather than the analysts who had conducted the testing, the court reasoned that the testing process does not become inculpatory and invoke the confrontation clause until an analyst employs his or her expertise to interpret the machine readings and

create a profile. Pineda used her expertise to create a factual profile that incriminated Lui, and therefore produced her own analysis, "an original product that can be tested through cross-examination." Lui, 179 Wn.2d at 489. Moreover, Pineda's prepared report was admitted for illustrative purposes only and did not go to the jury room. Accordingly, the Court concluded that Pineda was not a surrogate witness whose only purpose was to act as a channel for the DNA profile to enter evidence. Lui, 179 Wn.2d at 489-90.

Similarly, because Harruff used his expertise to turn raw body temperature data into a conclusion that inculpated Lui, it was Harruff and not Raven, with whom the confrontation clause is concerned. Lui, 179 Wn.2d at 493.

But, the Supreme Court concluded that the trial court had erred in admitting the toxicology and autopsy reports, where statements taken from the reports were used for the purposes of identifying the cause and manner of death and to prove that the deceased was dressed postmortem. Lui, 179 Wn.2d at 494. In this instance, Harruff "did not bring his expertise to bear on the statements or add original analysis -- he merely recited a conclusion prepared by nontestifying experts." Id. The court held this evidence violated Lui's right of confrontation. Lui, 179 Wn.2d at 495-97.

Like Harruff's testimony regarding the toxicology and autopsy reports in Lui, here, Runs Through provided no original analysis and brought no expertise to bear on Matthews' cellphone "chip-off" testing conclusions. Not only did Runs Through not personally conduct the "chip-off", but admittedly, also did not "re-run" any of the testing procedures that Matthews used to generate the evidentiary report that was submitted to the jury. 10RP 33, 42, 51-53, 89-90; Exs. 52, 58, 64, 65. Without performing any independent analysis, Runs Through was merely reciting a conclusion prepared by Matthews, a nontestifying expert. In short, Runs Through did not bring her expertise to bear on the report prepared by Matthews or add any original analysis. Rather, she merely reviewed Matthews' work and recited the testing results and conclusions that he reached. 10RP 42-44.

Similarly, Detective Cox testified to the information prepared by Matthews, about which he had no personal knowledge. The Aberdeen Police Department was incapable of performing the "chip-off" testing itself. Thus, in this case, for the first time ever, the Aberdeen Police Department sent the cellphone to Dixie State for specialized testing. 10RP 18-19. Cox offered no testimony which suggested he understood how the "chip-off" testing was conducted, or how Matthews reached his conclusions. Rather, Cox simply relied on the documents Matthews'

testing produced and concluded that the cellphone belonged to Steven Russell. Cox's conclusion hardly required an independent interpretation of Matthews' report, for the report itself concluded that the phone number and text messages belonged to "Steven Russell." 10RP 377-78; Exs. 64-65; See State v. Wade, 186 Wn. App. 749, 769, 346 P.3d 838 (finding confrontation clause violation where testifying records custodian acknowledged information about debit card transactions came from non-testifying bank investigator), rev. denied, 184 Wn.2d 1004, 357 P.3d 665 (2015). Cox's analysis of the testing report, which by itself inculpated Ramirez and Russell, simply parroted the report conclusions reached by Matthews. Significantly, unlike Lui, here the reports prepared by Matthews were also the only reports seen by the jury. 10RP 356-57, 370, 374-380, Exs. 52, 58, 64-65.

In this case, neither Runs Through nor Cox provided any original analysis and brought no expertise to bear on the testing report and conclusions reached by Matthews. As such, both were surrogate witnesses who merely recited conclusions reached by Matthews. Ramirez's confrontation rights were violated because he was not given an opportunity to cross-examine Matthew's about his testing procedure and conclusions. Melendez-Diaz, 557 U.S. at 319, n.6; Bullcoming, 564 U.S.

at 661; Lui, 179 Wn.2d at 462. Because the error cannot be deemed harmless beyond a reasonable doubt, reversal is required.

e. The Confrontation Clause Violation Requires Reversal.

The violation of Ramirez's confrontation rights requires reversal unless the State can prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Jasper, 174 Wn.2d at 117. It cannot do so.

The State's case against Ramirez was entirely "circumstantial". 4RP 64; 10RP 501-02; 11RP 3-4; See supra section C.2(c)(i). While Ramirez was seen in the company of Russell and Galeana at the hospital, the only evidence connecting him to Russell and Galeana at the time of the robbery was the cellphone evidence. The trial court recognized as much: "[T]his is an important piece of evidence that the State has, this cellphone. Because there's debate about identity and who was present during this alleged robbery." 5RP 26. The State also recognized the vital importance of the cellphone evidence during closing argument:

> Now, different evidence has different amounts of weight. Some of it has great value, like that cell phone. Cell phone told us all kinds of things...And what do we know? We know from those cell phone records that he [Russell] was hanging out with somebody named Silent, who is Alejandro Ramirez, before the incident. So some pieces of evidence, like that cell phone, give us a lot.

10RP 636-37, 651-52, 656.

The State's highlighting and repeated emphasis in closing argument shows the importance of the cellphone evidence and demonstrates why the State cannot prove beyond a reasonable doubt that the confrontation constitutional error did not contribute to the verdict.

As Jasper recognized,

> Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

174 Wn.2d at 117 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

In Ramirez's case, each of these factors weighs in favor of reversal. The cellphone evidence was crucial in tying Ramirez to the robbery. Given the dearth of other evidence connecting Ramirez to the robbery, the State's heavy reliance on the cellphone evidence, both in its case-in-chief, and during closing argument, and Ramirez's inability to cross-examine anyone other than surrogate witnesses who merely recited conclusions reached by Matthews, the State cannot carry its burden of showing the

confrontation clause violation was harmless beyond a reasonable doubt. Reversal of Ramirez's convictions is required.

4. THE FOURTH DEGREE ASSAULT CONVICTIONS MUST BE VACATED BECAUSE THEY MERGE WITH THE FIRST DEGREE ROBBERY AND ATTEMPTED FIRST DEGREE ROBBERY CONVICTIONS.

a. Double Jeopardy Prohibits Multiple Punishments for the Same Offense.

Both the Fifth Amendment of the United States Constitution and Article 1, § 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). One of the purposes of the double jeopardy clauses is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Courts look to legislative intent to discern whether the underlying and the elevated criminal offenses were intended to be punished separately. Freeman, 153 Wn.2d at 771. If the legislature has authorized punishments for both of the crimes, the prohibition against double jeopardy is not violated. Freeman, 153 Wn.2d at 771. Where there is doubt as to the legislature's intent, however, the rule of lenity requires merger and the conviction for the lesser offense is vacated. State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (rule of lenity requires merger where verdict is ambiguous); Tvedt, 153 Wn.2d at 711 (any ambiguity in

the unit of prosecution must be resolved against turning a single transaction into multiple offenses).

One tool for determining legislative intent in the double jeopardy context is the merger doctrine. Freeman, 153 Wn.2d at 777. Two offenses merge if, to elevate a crime to a higher degree, the State must prove the crime "'was accompanied by an act which is defined as a crime elsewhere in the criminal statutes[.]'" Freeman, 153 Wn.2d at 778 (citing State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). Thus, where a predicate offense is an underlying element of another crime, generally the predicate offense will merge into the second, more serious crime and the court may not punish it separately. Vladovic, 99 Wn.2d at 421. When determining merger, courts view the offenses as charged, not how they could have been charged. Freeman, 153 Wn.2d at 777.

A double jeopardy claim may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). The question whether the merger doctrine bars double punishment is reviewed de novo. Freeman, 153 Wn.2d at 770.

b. The Assault Elevated Robbery to the First Degree.

When a second degree assault is the force that elevates a robbery to the first degree, there is "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when

the assault facilitates the robbery." Freeman, 153 Wn.2d at 776. The principal applies with equal force to the present situation. Here, the fourth degree assault provided the force necessary to elevate the robbery to first degree, since it provided the force which inflicted the bodily injury, a necessary element of first degree robbery for which Ramirez was charged.

The first degree robbery was charged by amended information as follows:

> [O]n or about October 25, 2105, with intent to commit theft, did unlawfully take personal property that the Defendant [Ramirez] did not own from the person or in the presence of Agustin Morales-Gamez, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime and in immediate flight therefrom, the Defendant was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon and/or inflicted bodily injury upon Augustin [sic] Morales-Gamez[.]

CP 42.

The fourth degree assault against Morales-Gamez was charged as "[o]n or about October 24, 2015, did intentionally assault Augustin Morales-Gamez[.]" CP 43.

The information, instructions, and prosecutor's arguments, demonstrate the State relied on the conduct underlying the fourth degree assault to elevate the robbery charge to the first degree.

As charged, the State was required to prove Ramirez's infliction of bodily injury against Morales-Gamez overcame his will to retain the property. The basis for the assault – Ramirez's alleged hitting of Morales-Gamez – was the means of inflicting that bodily injury. Put another way, Ramirez's hitting of Morales-Gamez was the means of assaulting (inflicting bodily injury) Morales-Gamez in order to further the robbery, i.e., to forcibly take property from Morales-Gomez against his will.

The State's decision to amend the information to add two counts of fourth degree assault as alternative offenses to the robbery count, further illustrates that the conduct underlying the assault elevated the robbery charge to the first degree. As the prosecutor explained:

> It [the amended information] adds two counts of simple assault, fourth degree misdemeanor assault for the same incident, and that is because there's no lesser included of robbery one that would apply here. And if the jury - the jury could theoretically find that force was used, but nothing was taken or nothing was attempted to be taken. So the assault in the fourth degree is just sort of an alternative -- again, it's just a misdemeanor.

1RP 29-30.

During closing argument, the prosecutor further emphasized that the fourth degree assault charges were part and parcel with the robbery:

> If, in the course of the robbery the defendant inflicts bodily injury or displays whatappears to be a weapon or is a weapon, then its robbery in the first degree. Okay. Now, in this case you've got bodily injury. This is Agustin's

> head, as Officer Glaser told you. He's got a big 'ole something, bruise, laceration, medical terms, whatever you want to call it. All right. You saw him get hit over and over and over again. There's no doubt how this was caused.

10RP 641. The prosecutor continued, "Assault in the fourth degree, unquestionable. Because this is no ordinary robbery, they hit him [Morales-Gamez] over and over and over again." 10RP 645, 659.

Kier is instructive. Kier was a passenger in a car that honked at another car containing owner and driver Hudson and his passenger Ellison. Hudson stopped and got out of his car believing the honking suggested an interest in buying his car. Ellison stayed inside the car while Hudson spoke with the driver of Kier's car. During this conversation, Kier got out of the other car and pointed a gun at Hudson. Hudson ran away to call police. Kier approached Ellison, pointed the gun at him, and told him to get out of the car. Ellison complied and Kier drove away with the car. Kier, 164 Wn.2d at 801-03.

Kier was convicted of first degree robbery and second degree assault for the carjacking. Kier was convicted under RCW 9A.56.200(1)(a), which provides that a person is guilty of first degree robbery if he is "armed with a deadly weapon or displays what appears to be a firearm or deadly weapon, during the commission of a robbery." Kier

was also convicted of second degree assault under RCW 9A.36.021(1)(c), which requires assault with a deadly weapon. Kier, 164 Wn.2d at 805-06.

Relying on Freeman, the Supreme Court found the offenses merged because "the completed assault was necessary to elevate the completed robbery to first degree." The Court noted that as charged, both offenses required the State to prove Kier's conduct created a reasonable apprehension or fear of harm. The Court found Kier's display of a gun was the means of creating that apprehension or fear. Kier, 164 Wn.2d at 806-07.

Similar to Kier, here, the robbery is raised from the lesser crime of second degree to the greater first degree due to the infliction of bodily injury on Morales-Gamez through Ramirez's hitting Morales-Gamez on the head.

The State may nonetheless argue, that the offenses do not merge because the robbery was also charged with the alternative means of "armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon[.]" CP 42, 78 (instruction 27). As discussed in argument one, supra, however, the State presented insufficient evidence that Ramirez was armed with a firearm or other deadly weapon during the robbery and assault of Morales-Gamez. Indeed, the jury ultimately found that a firearm was not used by Ramirez during

either the first degree robbery or attempted first degree robbery. CP 94, 96.

The fourth degree assault against Morales-Gamez was necessary to elevate the robbery to the first degree because the infliction of bodily injury was essential to taking property against Morales-Gamez's will. The fourth degree assault, therefore, merged with the first degree robbery, and Ramirez's assault conviction against Morales-Gamez should be reversed and the case remanded for resentencing.

c. The Assault Elevated the Attempted First Degree Robbery.

For the same reasons discussed above, the fourth degree assault conviction against Leiva-Aldana merged with the attempted first degree robbery conviction against Leiva-Aldana, as it also provided the force necessary to elevate the attempted robbery to first degree.

In In re Francis, the Supreme Court determined that second degree assault merged with first degree *attempted* robbery as charged under a Freeman analysis. 170 Wn.2d 517, 525, 242 P.3d 866 (2010). The court noted that Francis had been charged with specific conduct -- inflicting bodily injury on the victim -- to satisfy the statutory element necessary to raise the attempted robbery to the first degree. Because the second degree conduct was inseparable from the attempted first degree robbery as it was

charged, the convictions were the same for purposes of double jeopardy. Francis, 170 Wn.2d at 526, n.5. (citing Freeman, 153 Wn.2d at 772-73).

In reaching this conclusion, Francis distinguished the holding of State v. Esparaza, 135 Wn. App. 54, 143 P.3d 612 (2006). In Esparaza, the defendant was charged with attempted first degree robbery and second degree assault. The Esparaza court rejected a double jeopardy analysis because the State *charged and proved* the defendant was armed with a deadly weapon. The State was therefore not required to prove that the defendant engaged in conduct amounting to second degree assault in order to elevate the attempted robbery to attempted first degree robbery. Esparaza, 135 Wn. App. at 61-64.

Unlike Esparaza, here the State failed to prove that Ramirez was armed with a firearm or other deadly weapon during the attempted first degree robbery of Leiva-Aldana. Thus, *as proved*, the fourth degree assault against Leiva-Aldana was necessary to elevate the robbery to the first degree because the infliction of bodily injury was essential to the attempted taking of property against Leiva-Aldana's will. The fourth degree assault, therefore, merged with the attempted first degree robbery, and Ramirez's assault conviction against Leiva-Aldana should be reversed and the case remanded for resentencing.

d. The Offenses Had No Independent Purpose or Effect.

Where the State uses an assault to elevate the robbery charge to the first degree, the offenses generally merge and are the same for double jeopardy purposes unless they have an independent purpose or effect. Francis, 170 Wn.2d at 525; Kier, 164 Wn.2d at 806; Freeman, 153 Wn.2d at 780.

Offenses may be separate in fact, however, if there is a separate injury to the complainant that is distinct from and not simply incidental to the greater crime of which it forms an element. Freeman, 153 Wn.2d 778-79. "The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime." Freeman, 153 Wn.2d at 778.

Ramirez's offenses merge when applying this test as well. As discussed above, the robbery was raised to first degree due to the infliction of bodily injury on Morales-Gamez's head. The assault had no purpose and effect other than to force Morales-Gamez to relinquish his property. The State presented no evidence to support a conclusion that Ramirez used more force then necessary to commit the first degree robbery.

"Using force to intimidate a victim into yielding property is often incidental to the robbery." Freeman, 153 Wn.2d at 779. This point is

illustrated by Freeman and Francis. Petitioner Freeman drew a gun, ordered the complainant to relinquish any valuables, and when the complainant did not immediate comply, Freeman shot the complainant and then robbed him. Freeman, 153 Wn.2d at 769. Petitioner Zumwalt, without demanding the complainant's property, punched him in the face, causing serious injuries. Zumwalt then robbed the complainant. Freeman, 153 Wn.2d at 769. The court concluded Freeman and Zumwalt assaulted the complainants to facilitate the robberies. Freeman, 153 Wn.2d at 779. Cf., State v. Prater, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981) (injury sustained by victim when defendant shot him in face not part of robbery because, by disabling victim, defendant hindered rather than aided commission of robbery), rev. denied, 97 Wn.2d 1007 (1982)).

The Francis Court similarly concluded a second degree assault was incidental to an attempted first degree robbery. Francis attacked two complainants with a baseball bat in order to steal $2,000. Francis failed to take any money because he fled when another person approached. One complainant died of his injuries. Francis pleaded guilty to the first degree murder of one complainant and second degree assault and attempted first degree robbery of the second complainant. Francis, 170 Wn.2d at 521. The Court concluded the assault was not separate and distinct from the

attempted robbery because the "sole purpose" of the assault was to facilitate the attempted robbery. Francis, 170 Wn.2d at 525.

Like Freeman and Francis, here the assaults were not 'separate and distinct' from the robbery; it was incidental to it. Under Freeman and Francis, it could not be punished independently from the robbery.

e. Vacation and Remand is the Appropriate Remedy.

It is established that the remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense. See, e.g., State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). In Francis, for example, the Supreme Court vacated the second degree assault because it merged with the attempted first degree robbery under double jeopardy. Francis, 170 Wn.2d at 531, 532.

This case should be remanded for entry of an order vacating the fourth degree assault convictions. Francis, 170 Wn.2d at 531; Kier, 164 Wn.2d at 814.

5. CUMULATIVE ERROR DENIED RAMIREZ OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative

error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

The accumulation of errors discussed above affected the outcome and produced an unfair trial in Ramirez's case. These errors include (1) insufficient evidence of first degree robbery and attempted first degree robbery; (2) improper joinder of Ramirez's case with that of his co-defendants; (3) denial of a motion to sever Ramirez's case from that of his co-defendants; and (4) violation of Ramirez's right to confrontation.

6. ADOPTION OF ARGUMENTS OF CO-APPELLANTS.

To the extent applicable, pursuant to RAP 10.1(g)(2), Ramirez adopts by reference the arguments set forth in each of co-appellant's opening briefs.

D. CONCLUSION

The State did not produce sufficient evidence to sustain Ramirez's convictions for first degree robbery and attempted first degree robbery. Accordingly, Ramirez asks this court to reverse. This court should also reverse Ramirez's convictions and remand for a new trial because several other errors deprived Ramirez a fair trial. This Court should also vacate

Ramirez's two fourth degree assault convictions and remand for resentencing. Finally, this court should decline to impose appellate costs against Ramirez.[12]

DATED this 13th day of June, 2017.

Respectfully submitted,

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[12] RAP 14.2 now provides, with regard to appellate costs:

> When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Ramirez indigent for purposes of the appeal. CP 16, 125-30. That finding remains in effect. Ramirez therefore does not include argument in his opening brief asking this Court to deny costs under State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), rev. denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

NIELSEN, BROMAN & KOCH P.L.L.C.

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